UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

W. TERRENCE PENNINGTON, Plaintiff, v. HANNAFORD BROS. CO., LLC, Defendant.	Civil Action No.

COMPLAINT
JURY TRIAL REQUESTED
INJUNCTIVE RELIEF REQUESTED

NOW COMES the Plaintiff, W. Terrence Pennington ("Pennington"), by and through undersigned counsel, and complains against the Defendant, Hannaford Bros. Co., LLC ("Hannaford"), as follows:

INTRODUCTION

1. Hannaford violated state and federal civil rights laws by firing Pennington because of his age (58) and disabilities (including heart disease, knee and back impairments, and a significant shoulder injury) and in retaliation for Pennington requesting and needing medical leaves of absence to which he was entitled under state and federal laws. Hannaford states that Pennington was terminated for extending the code dates on cut fruit in violation of food safety procedures and for directing his subordinates to do the same. Hannaford's stated reason is manufactured, untrue, and a pretext for terminating Pennington unlawfully.

2. This action arises under the Maine Human Rights Act ("MHRA"), 5 M.R.S. §§ 4551 *et seq.* the Maine Family Medical Leave Requirement Act ("MFMLR"), 26 M.R.S. §§ 844 *et seq.*, the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, the Age Discrimination

in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq*., and the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 *et seq.*

PARTIES

3. Pennington is a United States citizen residing in Warren, Maine.

4. Hannaford is a for-profit limited liability corporation based in Scarborough, Maine. It operates a chain of supermarkets in New England and upstate New York.

JURISDICTION

5. Hannaford had 500 or more employees for each working day in each of 20 or more calendar weeks in the same calendar year as when the alleged adverse action occurred.

6. Hannaford had 50 or more employees working within a seventy mile radius of Plaintiff's workplace in 2015 and 2016.

7. The amount in controversy in this matter exceeds $75,000.

8. This Court has subject matter jurisdiction over Pennington's federal and state claims pursuant to 28 U.S.C. §§ 133, 1332, and 1367.

9. On or about June 20, 2016, Pennington filed a timely Complaint/Charge of Discrimination against Delhaize America d/b/a Hannaford alleging unlawful age and disability discrimination and retaliation with the Maine Human Rights Commission ("MHRC") and Equal Employment Opportunity Commission ("EEOC").

10. On or about September 14, 2016, Pennington filed an amended Complaint/Charge of Discrimination against Hannaford Bros. Co., LLC with the MHRC and EEOC.

11. On or about January 19, 2017, the MHRC issued a Notice of Right to Sue with respect to Pennington's MHRA claims.

12. On or about January 26, 2017, the EEOC issued a Notice of Right to Sue with respect to Pennington's ADA and ADEA claims.

13. Pennington has exhausted his administrative remedies with respect to all claims requiring administrative exhaustion set forth in his Complaint.

JURY TRIAL REQUESTED

14. Pennington requests a trial by jury for all claims and issues for which a jury is permitted.

FACTUAL ALLEGATIONS

15. Pennington worked for Shop-N-Save/Hannaford from 1975 to 1986. He was a Department Manager when he left to take an Assistant Store Manager job with another employer.

16. Pennington returned to work for Hannaford as the Grocery Manager of the Waldoboro store (#8294) on March 30, 1994.

17. Pennington remained at the Waldoboro store until he was terminated on March 4, 2016.

18. From 1999 to 2016, Pennington was the Produce Manager although at times, his job title was Produce/Deli Bakery Manager.

19. Pennington received pay raises throughout his employment.

20. In 1999, Pennington made $12.00 per hour. In 2007, he made $17.58 per hour. In 2010, he made $19.30 per hour. In 2013, he made $20.95 per hour.

21. Pennington's final rate of pay in 2016 was $21.46 per hour with a guarantee of five hours at time and a half.

22. During his three decades of employment with Hannaford, Pennington requested and needed several medical leaves of absence for treatment of his physical impairments.

23. About 18 years ago at the age of 41, Pennington had a heart attack and needed to take a few weeks off.

24. Pennington had back surgery about 16 years ago and needed about three months off to recover.

25. Pennington suffered a torn meniscus and needed a leave of absence for treatment in 2011 or 2012.

26. Pennington recovered from these conditions and was able to work without restrictions as of January 2015.

27. At all times Pennington met and exceeded expectations for the Produce Manager position as reflected in his performance evaluations.

28. Pennington was the Health and Safety Chair for the store for over a decade. Before that, he was the Assistant Safety Chair.

29. Hannaford has a progressive discipline policy.

30. Pennington received two written warnings, one in 2000 and the other in 2002 more than a decade before he was fired.

31. Rick Purinton became the Store Manager of the Waldoboro store in about 2012 or 2013 and Pennington reported directly to him.

32. Pennington was 58 years old when he was fired.

33. Purinton knew Pennington's age. Purinton also knew that Pennington had physical impairments that amounted to disabilities including heart disease, knee and back impairments, and a significant shoulder injury.

34. Pennington injured his left shoulder in a fall at home in January 2015. He was diagnosed with left shoulder impingement syndrome and rotator cuff tear.

35. Pennington requested and needed a medical leave of absence from January 26 to March 9, 2015 to receive treatment and recover from his injury. His request was granted.

36. In 2015, Hannaford began plans to build a 19,000 square foot store to replace the 11,000 square foot store where Pennington worked.

37. After Pennington returned to work in March 2015, Purinton expressed doubt that Pennington was physically capable of running a larger Produce Department, a negative opinion about Pennington based on his age and disabilities not on his skill and experience.

38. Purinton said things like, “Are you sure you can handle it?” Pennington responded by saying something like, “I’m sure I can, I guess we’ll see.”

39. Conservative treatment for Pennington’s right shoulder was not successful and he had to have surgery to repair the damage in December 2015.

40. Pennington requested and needed another medical leave of absence from December 14, 2015 to February 29, 2016. His request was granted.

41. Pennington was released to return to work on Monday, February 29, 2016. He was on restricted duty; no lifting more than 5 pounds, no pulling more than 5 pounds, no reaching over head for long periods of time.

42. When Pennington arrived at work on Monday, February 29, 2016, he was called into the office and placed on administrative leave. Pennington was told that he was being investigated for cutting fruit ahead of time and not dating the fruit properly.[1]

43. Pennington admitted that he sometimes cut fruit at night, stored it overnight on a tray in the refrigerated produce room, and then put the fruit out for sale the following day. Pennington had done so for years and had been observed doing it by managers and inspectors.

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[1] At Hannaford, fresh fruit is cut, packaged, and dated before it is put in a refrigerated unit on the sales floor. There is a three day sell-by date. For example, if fruit is cut on the 8th day of the month, the 11th is the sell-by date.

Pennington denied that he ever extended the code date on fruit. If he priced and dated fruit that was cut the previous day, he would shorten the code by a day.

44. Hannaford asked Pennington whether his associates were coding fruit properly. Pennington was unsure how to answer given that Pennington had been out of work on medical leave since December 2015. Pennington said that his associates should be dating the cut fruit properly by taking a day off if fruit was cut the day before it was dated and set out. That is what he trained associates to do but he did not know what they actually did after he went out on leave.

45. On the afternoon of Friday, March 4, 2016, Pennington was called in for a meeting with Purinton and Heather Stanley, the Associate Relations Manager from another store. Pennington was told that they talked to everyone up the chain to the Vice President level and that they had to let him go.

46. Pennington was so shocked that he was left speechless.

47. Pennington had never seen anything in any food safety protocol or store policy that prohibited the way he cut, packaged and dated fruit.

48. Everyone in Pennington's department handled cut fruit the same way Pennington did including Assistant Manager Cynthia Burk, who covered for Pennington during his medical leave of absence.

49. Pennington did nothing to jeopardize the safety of food that Hannaford sold to its customers.

50. Hannaford's records show that it started investigating Pennington shortly before he returned to work from the leave of absence that began on December 14, 2015.

51. Hannaford alleges that while Pennington was absent, Purinton and other members of management observed code dating inconsistencies by produce associates.

52. Hannaford has alleged that associates were producing cut fruit at night, leaving it unlabeled in the cooler, then putting the fruit out the next day with a code date as if it had been cut the day it was shelved and not the day it was cut.

53. Hannaford has not identified which associates were actually observed putting inaccurate code dates on fruit.

54. Hannaford has not indicated what discipline or corrective action was taken against associates who were allegedly observed violating Hannaford's policies.

55. According to Hannaford, an employee named Dan Patee provided Hannaford with evidence proving that in November 2015, before Pennington went out on medical leave, that Pennington trained Patee who was then a new associate on the proper way to handle cut fruit. Pennington trained Patee to cut the fruit, place it in containers, and code date the produce with the date it was packaged for sale even if the package did not go out onto the floor.

56. According to Hannaford, an employee named Dave Heron also provided Hannaford with evidence that Pennington followed the code dating policy and trained employees properly to follow the policy. Heron told Hannaford that at the beginning of the summer 2015, Pennington instructed Heron to label containers of cut fruit with the date the fruit was cut.

57. Statements made by Patee and Heron disprove Hannaford's claim that Pennington told associates to extend the code dates on cut fruit.

58. According to Hannaford, an employee named Zachary Ripley told Hannaford that he did not remember how Pennington told him to code date cut fruit. Ripley's statement does not support Hannaford's claim that Pennington violated any policies.

59. According to Hannaford, an employee named Jesse Newcomb told Hannaford that prep fruit was made and thrown out within three days, which is the correct thing to do under

the policy. Newcomb also reported that at times Pennington told employees not to tag fruit, which is true but not complete. At times Pennington would reassign an associate to another more pressing task and then have someone else tag the fruit properly later.

60. According to Hannaford, Assistant Manager Cynthia Burk was the only employee who directly alleged that Pennington was labeling cut fruit with the wrong code date. Burk's motive for lying about Pennington is obvious; she was in line to take over his job as Produce Manager if Pennington was terminated.

61. Burk not only lied about Pennington's cut fruit labeling practices, she also lied about Pennington swearing, screaming and throwing things.

62. Hannaford's investigation of Pennington was suspicious on many levels.

63. The timing suggests that Hannaford was searching for a reason to fire Pennington.

64. A number of associates made statements about Pennington complying with policy and training them to do likewise yet that information was disregarded.

65. Pennington received no prior discipline for any alleged food safety violations.

66. Pennington received no training that would have led him to believe that the way he handled cut fruit violated any food safety rules or store policies.

67. Pennington's age (58 at the time of termination) puts him in a protected class under the MHRA and ADEA.

68. Pennington's heart disease, knee and back impairments, and his left shoulder impairment are disabilities under the MHRA and ADA.

69. Pennington's left shoulder impairment substantially limited major life activities when viewed in its unmitigated state including working and performing manual tasks.

70. Purinton regarded Pennington's heart disease, knee and back impairments, and his left shoulder impairments as disabilities and as impairments.

71. Purinton wrongly believed that Pennington was not young enough or strong enough to manage a larger Produce Department when the new Waldoboro store was completed.

72. Pennington's job performance was satisfactory.

73. Pennington was a qualified individual with a disability.

74. Pennington requested and needed time off from work more than once.

75. Pennington's medical leaves of absences were reasonable accommodations under the MHRA and ADA.

76. Hannaford's policies provided that employee's leave under the FMLA and MFMLR should be calculated using a rolling 12 month period looking forward from the first date that the employee used FMLA.

77. Hannaford employed more than 50 employees at Pennington's store.

78. Pennington's left shoulder impairment was a serious health condition as defined by the FMLA and MFMLR.

79. Pennington was eligible for FMLA and MFMLR leave for his shoulder condition.

80. Pennington was unable to perform his job during the period from December 14, 2015 until February 29, 2016.

81. Pennington's medical leaves of absence, including his leave from December 14, 2015 through February 29, 2016 were protected leave under the FMLA and MFLMR.

82. Pennington was suspended from work on the day he returned from his medical leave of absence, investigated, and fired four days later. Timing supports a finding of discrimination and retaliation in this case.

83. The fact that Pennington never received any disciplinary actions or performance improvement plans in connection with food safety and code dating is proof that Hannaford's stated reasons for his termination are pretexts.

84. The fact that Defendant violated its own progressive discipline policy is proof that Hannaford's stated reasons for Pennington's termination are pretexts.

85. The fact that during Pennington's medical leave of absence, Hannaford launched an investigation to find a reason to fire Pennington is evidence of discriminatory and retaliatory animus toward Pennington.

86. The fact that Pennington was removed from his position and terminated shortly after Pennington returned from protected leave is proof that Pennington was removed from his position and terminated due to disability discrimination, retaliation for requesting and needing a medical leave of absence, and retaliation for taking protected leave.

87. Hannaford treated Pennington differently and worse than similarly situated employees who were younger, did not have disabilities, and did not require protected medical leave.

88. Hannaford interfered with Pennington's right to use protected leave under the FMLA and MFMLR when they put him on administrative leave upon his return from medical leave on February 29, 2016 and terminated his employment on March 4, 2016.

89. Hannaford's failed to provide Pennington with protected medical leave and failed to return Pennington to his position at the conclusion of his medical leave on February 29, 2016 in violation of the FMLA and FMLR.

90. Hannaford retaliated against Pennington and terminated him because of his use of medical leave protected by the FMLA and MFMLR and considered his protected leave as a negative factor in the decision to terminate his employment.

91. Hannaford failed to reasonably accommodate Pennington's disabilities when it terminated him rather than permitted him to return to work.

92. Hannaford discriminated against Pennington because of his age.

93. Hannaford discriminated against Pennington because of his disabilities.

94. Hannaford discriminated against Pennington because it regarded him as a person with a disability.

95. Hannaford knowingly and willfully violated Pennington's rights under the ADA, ADEA, MHRA, FMLA and MFMLR.

96. Hannaford unlawfully discriminated against Pennington with malice or reckless indifference to his rights.

97. As a result of Hannaford's unlawful discrimination against Pennington, he has suffered lost wages, lost benefits, loss of enjoyment of life, loss of self-esteem, injury to reputation, injury to career, humiliation, and other pecuniary and non-pecuniary losses.

98. Pennington has no plain, adequate, or complete remedy at law to fully redress the wrongs alleged, and he will continue to suffer irreparable injury from his treatment by Hannaford unless and until Hannaford is enjoined by this court.

COUNT I: MHRA
UNLAWFUL DISCRIMINATION - DISABILITY

99. Paragraphs 1-98 are incorporated by reference.

100. Hannaford's conduct constitutes unlawful disability discrimination against Pennington in violation of the MHRA.

COUNT II: MHRA
UNLAWFUL RETALIATION

101. Paragraphs 1-100 are incorporated by reference.

102. Hannaford violated the MHRA by retaliating against Pennington because he required and used medical leaves of absence as reasonable accommodations for his disabilities.

COUNT III: MHRA
FAILURE TO ACCOMMODATE

103. Paragraphs 1-102 are incorporated by reference

104. Hannaford violated the MHRA by failing to provide Pennington with reasonable accommodations for his disability.

COUNT IV: MHRA
UNLAWFUL DISCRIMINATION - AGE

105. Paragraphs 1-104 are incorporated by reference.

106. Hannaford's conduct constitutes unlawful age discrimination against Pennington in violation of the MHRA.

COUNT V: ADA
UNLAWFUL DISABILITY DISCRIMINATION

107. Paragraphs 1-106 are incorporated by reference.

108. Hannaford's conduct constitutes unlawful disability discrimination against Pennington in violation of the ADA.

COUNT VI: ADA
UNLAWFUL RETALIATION

109. Paragraphs 1-108 are incorporated by reference.

110. Hannaford violated the ADA by retaliating against Pennington because he required and used medical leaves of absence as a reasonable accommodation for his disabilities.

COUNT VII: ADA
FAILURE TO ACCOMMODATE

111. Paragraphs 1-110 are incorporated by reference.

112. Hannaford violated the MHRA by failing to provide Pennington with reasonable accommodations for his disability.

COUNT VIII: ADEA
UNLAWFUL AGE DISCRIMINATION

113. Paragraphs 1-112 are incorporated by reference.

114. Hannaford's conduct constitutes unlawful age discrimination against Pennington in violation of the ADEA.

COUNT IX: FMLA

115. Paragraphs 1-114 are incorporated by reference.

116. Hannaford violated Pennington's prescriptive and proscriptive rights under the FMLA.

COUNT X: MFMLR

117. Paragraphs 1-116 are incorporated by reference.

118. Hannaford violated Pennington's prescriptive and proscriptive rights under the MFMLR.

PRAYER FOR RELIEF

Plaintiff respectfully requests that the Court grant the following relief:

a) Enter Judgment in Plaintiff's favor;

b) Declare the conduct engaged in by Defendant to be in violation of his rights;

c) Enjoin Defendant, its agents, successors, employees, and those acting in concert with it from continuing to violate his rights;

d) Order Defendant to employ Pennington in his former position or, in the alternative, award Pennington front pay and benefits;

e) Award equitable-relief for back pay, benefits and prejudgment interest;

f) Award compensatory damages in an amount to be determined at trial;

g) Award punitive damages in an amount to be determined at trial;

h) Award liquidated damages in an amount to be determined at trial;

i) Award Plaintiff penalties of $100 per day for each day that the violation of Plaintiff's rights under the MFMLR continues.

j) Award nominal damages;

k) Award attorney's fees, including legal expenses, and costs;

l) Award prejudgment interest;

m) Permanently enjoin Defendant from engaging in any employment practices which discriminate on the basis of age or disability or use of protected medical leave;

n) Require Defendant to mail a letter to all employees notifying them of the verdict and stating that Defendant will not tolerate discrimination in the future;

o) Require that Defendant post a notice in all of its workplaces of the verdict and a copy of the Court's order for injunctive relief;

p) Require that Defendant train all management level employees on the protections afforded by the MHRA, ADA, ADEA, FMLA and MFMLR;

q) Require that Defendant place a document in Pennington's personnel file which explains that Defendant unlawfully terminated him because of disability and age discrimination and retaliation; and

r) Grant to Pennington such other and further relief as may be just and proper.

Dated: February 9, 2017

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